No. 15,537

United States Court of Appeals

For the Ninth Circuit

ALAN W. BOUDREAU,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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No. 15,537

United States Court of Appeals
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Alan W. Boudreau,	*Appellant,*
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BRIEF FOR APPELLEE.

JURISDICTION.

Appellant's brief provides no basis upon which this Court has jurisdiction to review the District Court's order of dismissal for lack of prosecution. Such a statement is required by this Court's Rule 18(2)(b), which reads in pertinent part as follows:

> "2. This (appellant's) brief shall contain, in order here stated—
>
> "(b) A statement of the pleadings and facts disclosing the basis upon which it is contended . . . that this Court has jurisdiction to review the judgment, decree or order in question."

Lacking such statement, the appeal may be dismissed (Rule 18(7)).

The United States contends it is under no duty to supply jurisdictional statements for appellant. This appeal

should be dismissed for appellant's failure to state the basis of the Court's appellate jurisdiction.

STATEMENT OF THE CASE.

This purports to be an appeal from the District Court's order of dismissal (and its order denying reconsideration of the same) of a seaman's libel for alleged personal injury. After a number of hearings the libel was dismissed for lack of prosecution.

Appellant's purported statement of the case (appearing in his brief under the title "Chronological History of the Case") is essentially correct, so far as it goes. However the brevity of that statement does not give a true picture of the background of this litigation. It does not fairly recite the state of the record upon which the District Court's dismissal for lack of prosecution was based. Therefore, it is only proper that the entire chronicle of this matter be called to the Court's attention.

Appellee believes that the pertinent chronological procedural history of the cause is exactly as the Government set it out in its "Memorandum of Points and Authorities in Support of Motion to Dismiss For Lack of Prosecution" (Tr.* 26). The docket entries (Tr. 66) speak eloquently for themselves and constitute the true and complete "statement of the case" in this cause.

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*Transcript of Record.

The pertinent dates and docket entries are these:

years and months	2 years and 9 months	Date of injury	November 5, 1952
		Libel filed	May 5, 1954
		Dismissal calendar	December 30, 1954
		Answer filed	July 26, 1955
		Dismissal calendar	August 31, 1956
		Motion to dismiss for lack of prosecution	February 11, 1957
		Dismissal calendar	March 4, 1957
		Libel dismissed for lack of prosecution	March 11, 1957
		Libelant's motion for reconsideration of order of dismissal	March 25, 1957
		Motion for reconsideration of dismissal denied	March 26, 1957

Time elapsing between the date of alleged accident and entry of the Court's final ruling on the dismissal was in excess of four years and four months. Time elapsing between the filing of the libel and entry of the Court's final ruling was approximately two years and nine months. The only positive, forward-going action during that time was that of the Government in answering the libel. The time elapsing between the date the Government filed its answer and the Court's order of dismissal for lack of prosecution was one year, eight months. The cause was actually called on *three* of the Court's regular dismissal calendars over a period of practically two years (Tr. 66).

Before dismissing the libel for lack of prosecution, the Court conducted *seven* hearings (including three callings of its dismissal calendar) to ascertain why the matter had not been prosecuted and whether dismissal for lack of prosecution was justified in the premises (Tr. 66). Before dismissing the libel, Judge Goodman insisted that libelant's (appellant's) deposition first be taken so the Court

could review his sworn testimony for possible explanations for the delay in prosecution (Rep. Tr.,* 12, 17, 31).

The libel was then dismissed for lack of prosecution. Thereafter the Court was petitioned to reconsider its order of dismissal. The matter was again fully argued. Additional briefs were filed. Judge Goodman again took the matter under consideration. He again reviewed the deposition (Rep. Tr., p. 31, line 13). The motion for reconsideration was denied.

ISSUES PRESENTED.

Appellant's brief is a hodgepodge of omnibus argument, much of which may have nothing to do with issues before the Court. The required outline of issues presented is absent. Thus, it is difficult to ascertain exactly what appellant is complaining of, except possibly for the fact that his libel has been dismissed.

Appellant's miscellaneous arguments seem to be that in dismissing the libel for lack of prosecution the District Court—(1) Acted in excess of its jurisdiction, (2) Abused its discretion to dismiss the case for want of prosecution, (3) Deprived libelant of procedural due process, (4) Disregarded the equitable doctrine of laches, and (5) Refused to treat libelant as a ward of the admiralty.

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*Reporters' Transcript (District Court).

SUMMARY OF ARGUMENT.

It is the contention of appellee that:

a. This appeal should be dismissed because appellant's brief does not contain a statement of the pleadings and facts disclosing the basis upon which it is contended that this Court has jurisdiction to review the District Court's order of dismissal.

b. The District Court had jurisdiction to dismiss the libel for want of prosecution.

c. The District Court had power to dismiss the libel for want of prosecution.

d. The District Court did not abuse its discretion by dismissing the libel for want of prosecution.

e. By dismissing the libel the District Court in no way violated appellant's rights to procedural due process.

f. The doctrine of laches is not involved.

g. The mere assertion that appellant was a ward of the admiralty does not relieve him from the requirement that he be diligent in the prosecution of his cause.

ARGUMENT.

I. APPEAL SHOULD BE DISMISSED BECAUSE APPELLANT HAS FAILED TO SHOW APPELLATE JURISDICTION.

Rule 18(2)(b) of this Court specifically provides that appellant's brief shall contain among other things "(a) statement of the pleadings and facts disclosing the basis upon which it is contended . . . that this Court has jurisdiction to review the judgment, decree or order in question." It is further specifically required that—

> "(t)he statement shall refer distinctly (1) to the statutory provisions believed to sustain the jurisdictions, (2) to any treaty of the United States or statute, the validity of which is involved (giving the volume or page where the treaty or statute may be found in the official edition), setting it out verbatim or appropriately summarizing its pertinent provisions; (3) to the pleading necessary to show the existence of the jurisdictions, referring to the pages of the record in which they appear."

Appellant's brief contains no such statement divulging upon what the appellate jurisdiction of this Court may be grounded.

The appeal should be dismissed for failure to comply with provisions of Rule 18 and specifically for its failure to provide a basis upon which this Court's jurisdiction to review the order of dismissal below is predicated.

II. THE DISTRICT COURT HAD JURISDICTION TO DISMISS LIBEL FOR WANT OF PROSECUTION.

Appellant loosely contends, without troubling to support his contentions by citation of authority, that in dismissing the libel for lack of prosecution the District Court acted without "jurisdiction" (App. Op. Br.,* p. 4, line 7 and p. 6, lines 16-20).

Appellant's contention that the District Court acted without jurisdiction is absolutely baseless. It is suggested that appellant has confused the District Court's "*juris-*

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*Appellant's Opening Brief.

diction'' with its *power to act,* or possibly with the proper exercise of its discretion.

This issue requires only the most summary rebuttal here.

In *Article XII* of the Libel (Tr. 4) *libelant himself* asserted that the District Court had personal jurisdiction of the parties and subject matter jurisdiction of the cause. Of this there was never any question. The District Court did have both personal and subject matter jurisdiction. A court with both personal and subject matter jurisdiction cannot by mere abuse of its discretion—as appellant contends—divest itself of jurisdiction.

From their inception the federal courts have possessed general and original jurisdiction of admiralty and maritime matters (Const., Art. III, Sec. 2, Cl. 1). Appellant in this case libelled the Sovereign pursuant to provisions of the ''Suits in Admiralty Act'' (Act of March 9, 1920, Ch. 95, Par. 2; 41 Stat. 525; 46 U.S.C. 741-752, as amended). That Act confers exclusive original jurisdiction in connection with matters within its purview to the appropriate District Court sitting in admiralty.

A review of all reported cases (civil and admiralty) dismissed for want of prosecution has failed to divulge a single case in which the issue of the District Court's jurisdiction was ever raised. On the other hand, all federal appellate courts which have reviewed similar cases (including this Court on numerous occasions) have proceeded on the basis that there was no question of jurisdiction. *Hicks v. Bekins Moving & Storage Co.* (CA9C-940) 115 Fed. 2d 406; *U. S. v. Pacific Fruit & Produce*

Co. (CA9C-1943) 138 Fed. 2d 367; *Boling v. U. S.* (CA9C-1956) 231 Fed. 2d 926; *Russell v. Cunningham* (CA9C-1956) 233 Fed. 2d 806; *Barger v. Baltimore & O. R. Co.* (CADC-1942) 130 Fed. 2d 401; *Shotkin v. Westinghouse Electric & Mfg. Co.* (CA10C-1948) 169 Fed. 2d 825; *The MERCHANT* (CCSDNY-1857) 4 Blatchf. 105, Fed. Cas. No. 9,436.

The District Court in the instant case clearly had jurisdiction to dismiss the libel for want of prosecution.

III. THE DISTRICT COURT HAD POWER TO DISMISS LIBEL FOR WANT OF PROSECUTION.

Again, it is not clear from appellant's opening brief just what the bases of this appeal are. However, scattered through appellant's miscellany of arguments seems to be the assertion that the District Court had no *power* to dismiss the libel for want of prosecution. This assertion is for the most part unsupported by citation of authority. Such authorities as are provided are substantially unpersuasive and inapplicable.

The power to dismiss for want of prosecution rests in the inherent powers of the District Court and is expressly conferred upon it by Supreme Court Admiralty Rules 38 and 44 and by Rule 14 of its own General Rules.

A. The Court Had Inherent Power to Dismiss for Want of Prosecution.

That the power of dismissal for want of prosecution rests in the inherent powers of the District Court is very clear. In the case of *Hicks v. Bekins Moving & Storage*

Company (115 Fed. 2d 406, at 408), this Court approved and incorporated in its opinion the statement of Mr. George Longsdorf in his *Cyclopedia of Federal Procedure,* Vol. 5, § 1506, p. 80, that:

> "(i)t is the settled rule in the federal courts that an action at law may be dismissed for want of prosecution or other delay fatal to the continuance of the action. *Dismissal on such ground is discretionary with the courts, and within their inherent power,* independent of the statute or rule." (Emphasis added).

The same thought is expressed in 18 C. J. 110, pp. 1191, 1192 and in 17 Am. Jur. § 57, p. 88. Blackstone recognized the right of a court to enter a non-prosequitur in the event of failure of the plaintiff to prosecute his action (Blackstone Comm., Book III, ch. 20, p. 296, ch. 27, p. 451). See also Black on Judgments, 2d Ed., Vol. II, § 702, p. 1057; Freeman on Judgments, 5th Ed., Vol. 1, § 9, p. 16, Vol. 2, § 9, p. 16, Vol. 2, § 751, p. 1579.

The District Court for the District of Colorado has a rule similar to Rule 14 of the District in this case providing for dismissal for want of prosecution. It entered an order of dismissal pursuant to the rule. An appeal followed, and the Circuit Court of Appeals for the Eighth Circuit, in *Colorado Eastern Ry. Co. v. Union Pac. Ry. Co.,* 94 Fed. 312, at 313, said:

> "This is a very proper rule, but in the absence of such a rule, every court has the power to dismiss a cause for want of prosecution."

In addition to its expression of opinion in the *Hicks* case, *supra,* the Court of Appeals for the Ninth Circuit has

often recognized the inherent powers of the District Court to dismiss for want of prosecution.

U. S. v. Pacific Fruit & Produce Co., supra.

Boling v. U. S., supra.

Russell v. Cunningham, supra.

In the *Boling* case this Court recently stated (231 Fed. 2d 926, at 927):

> "The power of the trial court to dismiss a cause where the matter has become stale by virtue of inaction by plaintiff is inherent and has been crystallized by rule."

Admittedly, all authority cited heretofore derives from matters which have arisen in the trial courts' *civil,* as distinguished from *admiralty* dockets. It is submitted that, even absent express rule, the District Court, sitting in admiralty as it was in the instant case, has the same inherent power to dismiss a libel for want of prosecution. No logical distinction can be made in this regard between a court sitting in its admiralty, instead of its civil capacity.

Moreover, that the Court sitting in admiralty has inherent powers to dismiss a libel for lack of prosecution appears established from dictum in *The MERCHANT, supra.*

The District Court in the instant case had *inherent* power to dismiss the libel for non-prosecution.

B. Supreme Court Admiralty and Local General Rules Invest the District Court With Power to Dismiss for Want of Prosecution.

In his opening brief appellant chose to disregard altogether the District Court's *inherent* powers to dismiss the

libel for want of prosecution. The Court need not look beyond the District Court's inherent powers to dismiss. Nevertheless, the Supreme Court Admiralty and local General Rules invest the District Court with additional, if unnecessary, express power to dismiss the libel for want of prosecution.

1. The District Court Had Power to Dismiss the Libel Pursuant to Provisions of Local General Rule 14.

Congress has delegated to the Supreme Court full power to prescribe general rules for the admiralty practice (Act of June 25, 1948, c. 646; 62 Stat. 961, amended May 24, 1949, c. 139, § 104, 63 Stat. 104; 28 U.S.C. 2073).

Within its admiralty rule-making power the Supreme Court has in turn delegated to the District Courts the power to regulate their own practice (S. Ct. Adm. Rule 44).

> "In Suits in Admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules."

The District Court for the Northern District of California has promulgated its own General Rules of practice with a preamble providing that:

> "These (general) rules supplement the Federal Rules of Civil and Criminal Procedure, and *are applicable in all proceedings when not inconsistent with any Bankruptcy or Admiralty Rule.*" (Emphasis added).

Rule 14 of the District Court's General Rules instituted the so-called "dismissal calendar" for dilatory litigation in which good cause for lack of prosecution cannot be shown.

> "At a time fixed by the Court at least every six months, the Clerk in open Court, under the supervision of the Master Calendar Judge, shall call all civil actions pending in which no steps have been taken for six months.
>
> "Notice of the calling shall be mailed to all attorneys of record. If none of the parties nor their attorneys appear, or if good cause for the lack of prosecution is not shown, the Court may dismiss the action."

The grossly dilatory prosecution of appellant's case first came to the Court's attention on two callings of its dismissal calendar (Rep. Tr. pp. 2-3) pursuant to provisions of local General Rule 14, *supra*. On February 7, 1957, appellee formally asked the Court to dismiss the libel for lack of prosecution (Tr. 66). Thereafter, on February 11, 1957, Judge Goodman *on his own motion* continued the matter, setting it down for hearing on the next following (its third) dismissal calendar. Judge Goodman asked appellee to take appellant's long-denied deposition in the interim so the Court might ascertain whether appellant had any excuse for failure to prosecute.

> "The Court. You make arrangements for the deposition, file an answering affidavit, and I will continue this Motion for further hearing until the Dismissal Calendar." (Rep. Tr., p. 12, lines 11-13).

Therefore, on March 8, 1957, when the case appeared on the Court's regular admiralty dismissal calendar it was

called by virtue of Judge Goodman's order of February 11, 1957. Subsequently, the libel was dismissed for lack of prosecution.

With respect to the Court's exercise of its powers to dismiss under local General Rule 14 appellant's objections seem to be (1) that when the case was called on the dismissal calendar on March 8, 1957, it was not there on *the Court's* motion, (2) that local General Rule 14 applies to civil causes of non-admiralty concern only, and (3) that appellant's "last ditch" flurry of interest in his case put the libel beyond the ambit of Rule 14. There is no basis for any of these contentions.

Appellant's contention (Ap. Op. Br., p. 5, lines 19-26) that this case appeared on the Court's dismissal calendar or March 8, 1957 upon *appellee's* motion is utterly unfounded. The case appeared and was dismissed on the dismissal calendar by virtue of Judge Goodman's order (made in open court) on February 11, 1957 (see transcript excerpt, *supra*).

Appellant's contention (Ap. Op. Br., p. 3, lines 17-24) that local General Rule 14 applies only to civil actions of non-admiralty concern is baldly erroneous. The preamble to the local General Rules expressly provides that they "are applicable *in all proceedings* when not inconsistent with any Bankruptcy or Admiralty Rule" (emphasis added). Furthermore, appellant appears to be under the misapprehension that the local General Rules are the Federal Rules of Civil Procedure (Ap. Op. Br., p. 3, lines 18-24). They are not. They are merely local rules promulgated to regulate practice in the local District Court. Ap-

pellant's reference to Rule 81 of the Federal Rules of Civil Procedure has no more application to this matter than a citation to the Ten Commandments would have; appellant's citations of the *Theodorakis* and *Papanikolsow* cases are as far afield as would be a citation to *Shelly's Case* or to the *Dred Scott* decision (Ap. Op. Br., p. 3, lines 18-24).

After appellee had already asked the Court to dismiss the libel for lack of prosecution—and even after Judge Goodman had formally ordered the case called on the March 8th dismissal calendar—appellant filed a motion to set the cause for trial (Tr. 33; Rep. Tr., pp. 13-15). Appellant states that this "last ditch" flurry of apparent interest put the case beyond the ambit of Rule 14. (Ap. Op. Br., p. 3, lines 24-25 and p. 4, lines 1-8.)

It escapes appellee how appellant can seriously contend that "the record discloses that steps were taken by Libelant Appellant (*sic*) within the said six months" next proceeding the case's being placed on the dismissal calendar for the third time. The case was already on the dismissal calendar (February 11, 1957) before appellant bestirred himself to evince some indication of interest by moving the case to be set for trial (February 25, 1957).

The Court of Appeals for the Ninth Circuit has repeatedly observed in this type of case that subsequent diligence is no excuse for past negligence. In *Hicks v. Bekins Moving & Storage Co.*, 115 Fed. 2d 406, this Court wrote as follows at page 409:

> "Moreover, an order of dismissal may be granted, notwithstanding the plaintiff has been stirred into

action by the impending dismissal, for subsequent diligence is no excuse for past negligence."

See also *U. S. v. Pacific Fruit & Produce Co.* (CCA9C) 38 Fed. 2d 367, 372; *Holtzoff v. Dodge & Olcott Co.*, 34 App. Div. 353, 119 N.Y.S. 47, 49; *Buck v. Felder* (DC Penn-1912) 208 Fed. 474, 477.

Appellant also apparently contends that under provisions of Supreme Court Admiralty Rule 38 his libel could not or should not have been dismissed. Supreme Court Admiralty Rule 38 clearly applies and could have served as the Court's authority for dismissal of the libel for lack of prosecution. Admiralty Rule 38 reads as follows:

> "If, in any admiralty suit, the libelant shall not appear and prosecute his suit, and comply with the orders of the Court, he shall be deemed in default and contumacy; and the Court may, on the application of the respondent or the claimant, pronounce the suit to be deserted, and the same may be dismissed with costs."

In the terms of Admiralty Rule 38 libelant did not "appear and prosecute his suit" and Judge Goodman *could* have predicated his dismissal upon that Rule as well. However, the question of whether the libel could have been dismissed under Admiralty Rule 38 is probably moot. The dismissal was clearly and unmistakenly made under provisions of local General Rule 14 and within the broad general powers conferred upon the trial court by Supreme Court Admiralty Rule 44, as well as under the Court's inherent powers.

There can be no serious question but that in addition to its inherent powers to dismiss for lack of prosecution

the District Court in the instant case had power to dismiss pursuant to provisions of Admiralty Rule 38 and local General Rule 14 as well.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DISMISSING THE LIBEL FOR WANT OF PROSECUTION.

A. Unless There Has Been a Gross Abuse of Discretion a Trial Court's Dismissal for Lack of Prosecution Will Not Be Upset.

Federal courts have consistently held that it is within the sound discretion of the trial court to dismiss a complainant's cause of action where the complainant has failed to prosecute his action with reasonable diligence.

Barger v. Baltimore & Ohio Railroad, supra.
Shotkin v. Westinghouse Electric Co., supra.
U. S. v. Pacific Fruit & Produce Co., supra.
Boling v. U. S., supra.
Hicks v. Bekins Moving & Storage Co., supra.
Russell v. Cunningham, supra.
The MERCHANT, supra.
Douglass v. The WASHINGTON (DCPa-1841) Fed. Cas. No. 4,033.

The Ninth Circuit has determined that not even mere abuse of discretion will suffice to reverse a District Court's order of dismissal for want of prosecution. In one of the leading authorities on this subject, *Hicks v. Bekins Moving & Storage Co.,* 115 Fed. 2d 406, this Court has held (at p. 409):

> ". . . Unless it is made to appear that there has been a *gross* abuse of discretion on the part of the trial court in dismissing an action for lack of prosecu-

tion, its decision will not be disturbed on appeal." (Emphasis added).

o the same effect is *Sweeney v. Anderson* (CCA10C-1942) 29 Fed. 2d 756.

Again, the Court of Appeals for the Ninth Circuit in a er curiam opinion by Circuit Judges Healy, Lemmon and 'ee has stated as follows in *Boling v. U. S.,* 231 Fed. 2d 26, at page 927:

> "One of the causes of congestion of the trial dockets is the failure of courts to exercise the authority vested in them thus to dispose of cases which are shaky or unfounded but which are held on the calendar for nuisance value. Since trial judges are hesitant to dismiss such causes of their own motion, for fear of injustice to some litigant, the device of placing cases in which no action has been taken for a considerable time on a docket for dismissal, absent a showing of adequate explanation for the delay, has been used. But even this palliative for the admitted evil has been of little avail, because of the innate hesitancy mentioned above. Because of this fact, *an order of dismissal for failure to prosecute will never be set aside unless there has been an abuse of discretion, and, of course, such a situation is not presumed.*" (Emphasis added).

3. Burden of Proving Gross Abuse of Discretion Rests Upon Appellant.

The burden rests with the appellant to establish that, n dismissing for want of prosecution, the District Court *grossly* abused the discretionary power with which it is inherently endowed. See *Gurst v. San Diego Transit System,* 119 Cal. App. 2d 51.

C. The Record Discloses No Abuse of Discretion in Dismissing

A review of the record and reading of appellant's brie disclose no conduct on the part of the District Court whic could in any way be considered a manifest or gross abus of discretion in dismissing appellant's libel. Nowhere doe appellant, by suggestion or inference, contend that the dis missal was a result of arbitrary, fanciful or unreasonabl conduct on the part of the District Court. The presence o absence of such conduct is determinative of whether or no there was any abuse of the Court's discretion.

U. S. v. McWilliams (CADC-1947) 163 Fed. 2d 695.

Time elapsing between the date of alleged accident (No vember 5, 1952) and entry of the Court's final ruling on the dismissal (March 26, 1957) was in excess of four years and four months. Time elapsing between the filing of the libel (May 5, 1954) and entry of the Court's final ruling was approximately two years and nine months. During all that time the only positive, forward-going action taken was that of the Government in answering the libel (July 26, 1955). The time elapsing between the date the Government filed its answer and the Court's order of dismissal was one year and eight months.

The cause was actually called on *three* dismissal calendars over a period of practically two years. In fact, the only dismissal calendars in the last two years upon which the case did *not* appear automatically were two which were avoided by appellant's filing of sham notices for taking depositions (December 20, 1955 and January 22, 1957—Tr. 66). As to the first of these sham notices the record discloses (Tr. 24) that:

"On December 19, 1955 proctor for libelant served upon . . . (the Government's counsel) a notice for the taking of the deposition of D. G. Volpintesta, which deposition was noticed for December 22, 1955 at the office of libelant's proctor; in response to the aforesaid notice . . . (the Government's proctor) personally attended at the offices of proctor for libelant at the time and place designated in the notice on December 22, 1955; proctor for libelant was present and asserted 'that he did not know anything about the matter'; no reporter had been summoned nor was any present; the Volpintesta deposition was not then and has not since been taken."

It is common knowledge to both Court and practitioner hat delinquent cases can sometimes "dodge" the dismissal alendar by counsel's filing a sham notice or motion, which, fter the danger of dismissal has receded, is normally alowed to die unprosecuted in the clerk's docket.

The record discloses (Tr. 24, 25 and 66) that once again nore than a year later another sham deposition notice was iled with the Court and served upon the Government's ounsel.

"On January 23, 1957 . . . (Government counsel) was served by proctor for libelant with notice for the taking of the deposition of William McGurty; the notice provided that the McGurty deposition would proceed at 9:30 A.M. on January 28, 1957 at the office of Libelant's proctor; . . . shortly after 9:00 o'clock on the morning of January 28, 1957, the secretary for libelant's proctor telephoned . . . (Government counsel's) office to advise that the McGurty deposition would not proceed; the deposition did not proceed and

has not since been taken; there has been no further notice for the taking of the deposition."

The record further discloses (Tr. 27), without denial from libelant, that the Government repeatedly requested the discovery deposition and medical examination of libelant commencing from a date shortly after filing of the libel. The Government's requests were made both by telephone and in writing. The record includes a copy of the Government's formal written request for libelant's deposition (Tr. 39). Libelant ignored that request.

Libelant was not finally made available for deposition until February 19, 1957, almost two weeks *after* the Government's motion for dismissal and a week after the case was placed on its third dismissal calendar. This was more than four years after the date of alleged injury.

Judge Goodman ordered libelant's deposition taken by the Government at such a late date to enable the Court to ascertain from libelant's own testimony whether there was any explanation other than inexcusable neglect for his failure to prosecute (Rep. Tr., 12, 17, 31). In taking libelant's deposition under the Court's order, counsel for the Government sought to devolp whether libelant or his proctor *ever* sought to contact each other to prosecute the action or to provide the Government with libelant's deposition. Proctor for libelant refused to let libelant answer. (Dep.,* p. 57, line 15, *et seq.*).

Appellant's testimony (Dep., pp. 6-31), supported by sixteen United States Coast Guard Certificates of Dis-

*Libelant's Deposition taken February 19, 1957.

harge attached to the deposition, demonstrates that in ne four years and four months between appellant's al-ged injury and the deposition date he had been at sea or only 23 months and had been ashore working in and round San Francisco for a total of 26 months. Most of he time he has lived in San Francisco. Libelant is not hysically disabled. He owns and drives a car and has by is own admission made innumerable trips to and through San Francisco, during any one of which he might have een made available for the taking of his deposition by he Government.

Judge Goodman was acutely aware of the advanced age f the case (Rep. Tr. pp. 8-11). He stated the problem in-olved clearly:

> "The Court. A man assigned on a boat. The next day he claimed he had some injuries. The next year he filed a claim, an administrative claim. In May, 1954 he filed this suit. This is March of 1957. Five years have gone by since this thing happened. In the meantime he has been going to sea. It is really a stale claim." (Rep. Tr., p. 29, lines 7-12.)
>
> ". . . The Court. . . . It is a question of the policy of the law with respect to so-called stale claims. It is the difficulty that those cases present to a Court endeavoring to try to do justice. One man might remember somewhat better than another, but it is a bigger question than that." (Rep. Tr., p. 29, line 22-p. 30, line 1.)

Judge Goodman's fears that the case was "stale" were justified by libelant's own deposition testimony. In at least twelve places libelant was unable to recall material facts pertaining to his alleged injury. He did not recall the size of bulbs he was working on (Dep. p. 33, lines 6-7); the

construction of the railing he was standing on (p. 33, lines 12-14); which end of the vessel's engine room he was working in (p. 34, lines 5-10); which direction he was facing (p. 34, lines 11-14); the number of rails in the handrail allegedly involved (p. 37, lines 16-19); whether when the accident happened he was standing on the rail or on a pipe somewhere else (p. 38, lines 2-5); the nature of the inspection box he was working on (p. 39, lines 16-20); whether he was working under any of his superior officers that day, and if so, which one or ones (p. 42, lines 11-22); the proportions or construction of the adjacent catwalk (p. 45, lines 11-26); the kind of shoes worn that day (p. 47, lines 14-26). On two occasions libelant admitted the events occurred too long ago for him to remember them:

> "A. I am not sure if it worked on hinges or not I believe that you just—I have done so many of them they are different, but I believe it worked on a hinge *That is a long time ago, as I say.*" (p. 39, lines 17-20. Emphasis added).
>
> "A. *This is a long time* (ago), *and I don't remember too clearly,* but anyhow . . . etc.," (p. 34, lines 14-15. Emphasis added).

Libelant could not even recall if he had ever read or executed an administrative claim as required under provisions of the "Suits in Admiralty Act" (Dep. pp. 58-59) or whether he had verified his own libel (Dep. p. 59).

Against all of this all appellant can say is that the Government asked for and received time from libelant within which to plead. This argument cannot avail against the Court's order of dismissal. In fact, when proctor for libelant complained about time he extended to the Government to answer Judge Goodman remarked:

> "May I interupt you counsel? You were the master of the ship; you didn't have to stand by and allow the defendant *(sic)* a year and a half to answer. You could have pressed him" (Rep. Tr., p. 21, lines 9-12).

r, as the same idea has been expressed by the Court of ppeals for the Ninth Circuit in *U. S. v. Pacific Fruit & roduce Co.,* 138 Fed. 2d 367, at 372:

> "The duty rests upon the plaintiff at every stage of the proceeding to use diligence and to expedite his case to a final determination, and unless it is made to appear that there has been a *gross* abuse of discretion on the part of the trial court in dismissing an action for lack of prosecution its decision will not be disturbed on appeal."

Before dismissing the libel for lack of prosecution, the ourt conducted *seven* hearings (including three callings f its dismissal calendar) to ascertain why the matter had ot been prosecuted and whether dismissal for lack of rosecution was justified in the premises (Tr. 66). Before ismissing the libel, Judge Goodman insisted that libelnt's (appellant's) deposition first be taken so the Court ould review his sworn testimony for possible explanaions for the delay in prosecution (Rep. Tr., 12, 17, 31).

The libel was then dismissed for lack of prosecution. hereafter the Court was petitioned to reconsider its order f dismissal. The matter was again fully argued. Addiional briefs were filed. Judge Goodman again took the natter under consideration. He again reviewed the depoition (Rep. Tr., page 31, line 13). The motion for reconideration was denied.

The argument of appellant that the order now appeal from was entered in the exercise of an abuse of judici discretion is without merit. A reading of the record this case, and an examination of appellant's brief, fai to establish *any* abuse, and certainly discloses no gro abuse of discretion on the part of the District Court i dismissing the case. As has been stated in *Hicks v. Bekin supra,* in the absence of a showing of a gross abuse discretion, an order such as is now before this Court fo review is not susceptible to reversal on appeal.

V. BY DISMISSING LIBEL THE DISTRICT COURT IN NO WA DEPRIVED APPELLANT OF PROCEDURAL DUE PROCESS.

Appellant's opening brief contains the glancing asse tion that Judge Goodman's dismissal of the libel for lac of prosecution in some way deprived appellant of "du process of law" (Ap. Op. Br., p. 6, lines 21-23).

Since appellant submits no citation of authority for thi argument either, it is left to the Court and to appellee t fill in the elements of the abuse which purportedly de prived appellant of due process. However, if it is appe lant's contention that dismissal of his libel violated hi rights to *procedural* due process, that argument can b put to sleep summarily.

Without citing unnecessary authority, the Governmen submits that the recognized requisites of procedural du process are (1) a hearing before an impartial tribunal o competent jurisdiction, (2) due notice of any hearings and (3) the right to appear and be heard on the issues Since appellant nowhere in the record or in his brief eve

ıfers that his right to any one of these elements of pro-
edural due process has been infringed—and appellee is
ertain none has been—it can only be assumed by the
ourt that there was no violation of due process.

In any event, the question of whether a dismissal for
ant of prosecution deprives a litigant of procedural due
rocess has been clearly answered in several cases, among
nem *Shotkin v. Westinghouse Electric & Mfg. Co.*
CCA10C) 169 Fed. 2d 825. In that case the facts were
ar more extreme than in the instant one because appel-
ınt there had not even had *notice* of the impending dis-
ıissal. The Circuit Court in that case wrote, at page 826:

> "The judgment of dismissal is silent in respect to the place at which it was entered and as to whether notice was given to the parties. It is stated in the brief of appellant that the judgment was entered at Topeka, Kansas, without notice and opportunity to be heard; and upon that statement in the brief, it is argued that appellant was denied due process. While ordinarily notice and opportunity to be heard should be given, the dismissal without notice of an action for failure of plaintiff to prosecute with reasonable diligence does not contravene any sustainable concept of due process with which we are familiar."

t is to be noted that neither notice nor opportunity to be
ıeard were given in the *Shotkin* case, yet no deprivation
)f appellant's rights to procedural due process was seri-
)usly considered. In the instant case there were *seven*
luly noticed hearings, at all of which appellant appeared
)y his proctor. A number of briefs were filed, appellant's
leposition was ordered taken for the purpose of ascer-
aining any possible excuse for non-prosecution, and the

matter was formally reconsidered by the Court after its initial dismissal for want of prosecution.

To contend seriously here that appellant was deprived of procedural due process is altogether uncalled for and unjustified.

VI. THE DOCTRINE OF LACHES IS NOT INVOLVED.

The doctrine of laches is not involved in this matter as appellant asserts it is (Ap. Op. Br., p. 5, line 14-page 6, line 10), although if it were the matter would certainly have been dismissible on the grounds of laches for non-prosecution.

The Government's motion was not grounded upon the doctrine of laches. Nowhere in the various hearings conducted by Judge Goodman and nowhere in the briefs was the doctrine of laches under consideration. The Court's initial order of dismissal is for "lack of prosecution" (Tr. 47), based upon a provision of local General Rule 14.

The issue of laches was not involved in appellant's motion for reconsideration, nor is it germane to Judge Goodman's "Order Denying Motion to Reconsider Order of Dismissal" (Tr. 62).

However, it is clear from the authorities that the mere institution of proceedings does not relieve a party from the duty to prosecute his cause diligently. This is abundantly clear of proceedings in equity *(Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Ry. Co.,* 80 Fed. 2d 32, 101 A.L.R. 688, Cert. Den., 56 S.Ct. 591, 297 U.S. 715, 80 L.Ed. 1001).

"*Neglect to prosecute pending suit.* Negligence in the prosecution of a suit after its commencement may bar relief; the mere institution of a suit does not of itself relieve a person from the operation of the rule of laches; if he fails to prosecute his suit diligently the consequences are the same as though no suit had been begun." (30 C.J.S. § 115)

The rule for the Court of Appeals for the Ninth Circuit is also to the effect that the doctrine of laches may be applied against a libelant for non-prosecution of a libel. In the leading authority on this point this Court has stated as follows:

"And 'the mere institution of a suit does not relieve a person from the operation of the rule of laches, if he fails to prosecute his suit diligently, the consequences are the same as though no suit had been begun,' 21 C.J. 125; *Johnston v. Standard Mining Co.,* 148 U.S. 360; *Sullivan v. Portland R. Co.,* 94 U.S. 806; *Barber v. Barber,* 121 Va. 740, 94 S.E. 209; *Drees v. Waldron* (8CCA), 212 Fed. 93; *U.S. v. Fletcher* (8CCA), 242 Fed. 818; *Northrup v. Browne* (8CCA), 204 Fed. 224; *Hendryx v. Perkins* (1CCA), 114 Fed. 801; *Gill v. Colton,* 12 F. (2d) 531 (4CCA)."

The KERMIT (CCA9C-1935), 76 Fed. 2d 363, 367, 1935 A.M.C. 571, 579.

This rule has also been clearly enunciated by the Court in the Southern District of California in *The FREDERICKSBURG* (1947 A.M.C. 1729, 1731).

The opinion of the Ninth Circuit in *The KERMIT, supra,* is also the leading authority to the effect that in admiralty matters the issue of laches is to be determined

by the District Court whose determination will not b upset absent abuse of discretion.

> ". . . (t)he question of laches is addressed to th sound discretion of the trial judge and his decisio will not be disputed on appeal unless it is so clearl wrong as to amount to an abuse of discretion."
>
> (76 Fed. 2d 363, 367, 1935 A.M.C. 571, 579.)

As carefully outlined for the Court in Section IV (C) above, the record discloses no abuse of the Distric Court's discretion.

Appellant argues that the Government is benefiting from its own inaction. The Clerk's docket (Tr. 66) un impeachably demonstrates where the inaction was and on whose part. In addition the Court's attention is called t the reporter's transcript of proceedings conducted before Judge Goodman on August 31, 1956 (Rep. Tr. pp. 3-4) in which the Government clearly indicated to the Court its readiness to proceed to trial in the month of November, 1956, *provided* the Government be accorded the usual pre-trial procedure before that time.

Accordingly, although the appellee believes the doctrine of laches is not actually involved in this matter, a motion made on the basis of that doctrine could and should have resulted in the same result below, a decree of dismissal for lack of prosecution.

VII. FACT APPELLANT WAS A SEAMAN DOES NOT RELIEVE HIM OF DUTY TO PROSECUTE HIS CAUSE DILIGENTLY.

Throughout his opening brief appellant argues that there is something about his having been a seaman which

perates to relieve him of the duty of prosecuting his use with diligence.

"It is not a circumstance that will excuse delay that he libelant is a seaman" *(The VEMA* (DCEDNY-1939) 939 A.M.C. 458, 461, citing *Marshall v. Int'l Mercantile Marine Co.,* 39 Fed. 2d 551, 1930 A.M.C. 720).

There is certainly nothing in the fact that appellant was formerly a seaman which in this case made it a hardship or inconvenience for him or his proctor to prosecute diligently. The uncontroverted record is quite clear to the contrary. Appellant's own testimony (Dep., pp. 6-31), supported by sixteen United States Coast Guard Certificates of Discharge attached to the deposition, demonstrates that in the four years and four months between appellant's alleged injury and the date of dismissal he had been at sea only 23 months and had been ashore working in and around the San Francisco area for a total of at least 26 months. Most of the time he was physically present in San Francisco. There is absolutely nothing in the record to explain why libelant's having been a seaman at the time he was injured affected his ability to prosecute his suit.

That the seaman is, in appropriate circumstances, a ward of the admiralty has long been the sentiment of the law. It is possible that continued blind invocation of this ancient maxim by seamen's proctors may—under contemporary circumstances—more abuse than honor the original sentiment of the Courts in this respect.

Certainly, appellant can take no solace from the argument that he was formerly a seaman, and thus a ward of

the admiralty, under the circumstances of the instan case.

CONCLUSION.

The record in this case and arguments propounded b appellant fail to disclose in any manner that the Distric Court abused its inherent judicial power or its powe under local General Rule 14 in dismissing the libel in thi case.

The brief for appellant fails to disclose the appellat jurisdiction of this Court within the purview of thi Court's Rule 18(2)(b).

Appellee, United States of America, respectfully sub mits that the appeal should be dismissed for the foregoing reasons or in the alternative that the order of Cour appealed from should be affirmed.

Dated, San Francisco, California,
August 5, 1957.

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